

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

WILTON W. DRURY, SR.,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

(CSA 3 524 914)

DOCKET NUMBER
DC-0831-97-0668-I-1

DATE: 9/8/98

Wilton W. Drury, Jr., Norfolk, Virginia, for the appellant.

Kenneth R. Brown, Washington, D.C., for the agency

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of an initial decision, issued September 26, 1997, that reversed its reconsideration decision, which determined that the appellant was ineligible for a waiver of the regulatory requirement that a deposit for his post-1956 military service be made before separation from the service. For the reasons set forth below, we GRANT OPM's petition, and AFFIRM the initial decision AS MODIFIED, still REVERSING OPM's reconsideration decision.

BACKGROUND

¶2 The appellant retired from the Department of the Navy effective March 3, 1995. The appellant's Certified Summary of Federal Service reflected one month of military service in 1958. Subtab 6.¹ In March 1997, OPM advised the appellant that, pursuant to Public Law No. 97-253, it was required to recompute his annuity to eliminate service credit for his post-1956 military service, because he had not made a deposit to the Civil Service Retirement Fund for this service. Subtab 4. OPM summarized the requirements of Public Law No. 97-253 as follows:

One change [made by Public Law No. 97-253] affects civil service retirees who retired on or after September 8, 1982, and who performed active-duty military service after December 31, 1956. The law allows them to receive credit for their active-duty military service after 1956, under both the Civil Service Retirement System and Social Security, if the annuitant pays a 7 percent deposit of their estimated earnings or basic pay for their active-duty military service after 1956. ... In absence of this completed deposit prior to retirement, upon reaching age 62 and verification that the annuitant is entitled to Social Security, the annuity will be recomputed by eliminating credit for all post-1956 military service from the annuity computation.

Subtab 4.²

¶3 After OPM reaffirmed this determination on reconsideration, Subtab 2, the appellant filed a timely appeal with the Board's Washington Regional Office. It was undisputed that the appellant had not made a deposit for his post-1956

¹ Except where otherwise noted, all references to the record are to Tab 5 of the Initial Appeal File.

² This is an accurate summary of the requirements of Public Law No. 97-253. *See* Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, §§ 306-07, 1982 U.S.C.C.A.N. (96 Stat.) 763, 795-98, as amended by Act of October 15, 1982, Pub. L. No. 97-346, § 3, 1982 U.S.C.C.A.N. (96 Stat.) 1647-49 (codified in 5 U.S.C. §§ 8331, 8332, 8334, 8348); *Jacob v. Office of Personnel Management*, 69 M.S.P.R. 340, 342-43 (1996).

military service prior to his retirement, and that he became eligible for Social Security benefits in March 1997. The dispositive issue was whether the appellant should have been allowed to make a post-retirement deposit for his military service under the provisions of 5 C.F.R. § 831.2107(a)(1), which provides that --

a separated employee who, through administrative error, did not make or complete the deposit prior to his or her separation must complete the deposit in a lump sum within the time limit set by OPM when it rules that an administrative error has been made.

¶4 The administrative judge determined that the appellant's failure to make a deposit for his post-1956 military service prior to separation was a result of administrative error. In doing so, she relied on the Board's decision in *Nunez v. Office of Personnel Management*, 69 M.S.P.R. 326 (1996),³ and its progeny. In *Nunez*, the Board found administrative error in the employing agency's failure to comply with the requirements of OPM's Federal Personnel Manual (FPM) Letter 831-83. That letter required agencies to obtain certifications from retiring employees that state:

I have read the information about the effect of not making a deposit for my post-1956 military service and I do NOT want to make the deposit. I understand that I can't change my decision after I retire.

69 M.S.P.R. at 332.

¶5 It was undisputed that the appellant's employing agency did not get such a certification from him. OPM argued that the certification requirement of FPM Letter 831-83 was no longer in effect at the time of the appellant's retirement in 1995, and had been superseded by its January 1990 revision of the retirement application form, SF-2801. Subtab 1. OPM contended that the new application

³ Three additional decisions were issued the same day as *Nunez*, also dealing with requests to make post-retirement deposits for post-1956 military service on the basis of administrative error. See *Jacob v. Office of Personnel Management*, 69 M.S.P.R. 340 (1996); *Cox v. Office of Personnel Management*, 69 M.S.P.R. 320 (1996); *Mopps v. Office of Personnel Management*, 69 M.S.P.R. 314 (1996).

form, together with its attached instructions, adequately informed the appellant of the opportunity to make a deposit for his post-1956 military service, and the consequences if he did not do so.

¶6 The administrative judge acknowledged that FPM Letter 831-83 was abolished on December 31, 1993, prior to the appellant's retirement. She found, however, that FPM provisions may still be considered "to the extent that they provide useful guidance." Initial Decision at 5. The administrative judge found that the appellant in this case had not been placed on clear notice of his deposit election rights, and the effect of waiving the deposit, and that this constituted administrative error. Although she acknowledged that the application form the appellant completed asked him about a deposit for post-1956 military service, she found the absence of a certification, or other evidence that the appellant had read about the effect of not making such a deposit and that he understood that he could not change any decision waiving a deposit after he retired, to be sufficient evidence that an administrative error occurred.

ANALYSIS

The certification required by FPM Letter 831-83 is not required for employees who retired after December 31, 1993, and who completed the January 1990 version of the retirement application form.

¶7 In its petition for review, OPM contends that the administrative judge erred in applying the *Nunez* line of cases to a case such as this one, where the applicant used the January 1990 version of its retirement application form, SF-2801, and where the application process occurred after the abolition of the FPM. As discussed below, we disagree that the *Nunez* line of cases has no application to this appeal. We concur, however, with OPM's contention that the certification requirement of FPM Letter 831-83 is not required for employees retiring after December 31, 1993, and who completed the January 1990 version of the retirement application form.

¶8 As the administrative judge acknowledged, the entire Federal Personnel Manual, including FPM Letter 831-83, was abolished on December 31, 1993. *Nunez*, 69 M.S.P.R. at 332 n.3. The administrative judge was correct in observing that the FPM can continue to provide useful guidance in appropriate circumstances.⁴ *Cf. Markland v. Office of Personnel Management*, No. 97-3249, slip op. at 6 (Fed. Cir. Apr. 2, 1998) (until OPM publishes another interpretation of the RIF regulations, the FPM remains a valuable resource for the purpose of construing the meaning of “competitive area”). But it is one thing to rely on the former FPM for general guidance; it is quite another to require the specific administrative procedure set out in FPM Letter 831-83.

¶9 In finding that the employing agency’s failure in *Nunez* to get the certification described by FPM Letter 831-83 constituted administrative error, the Board relied on the mandatory nature of the certification requirement, as well as the fact that the FPM provision was in effect at the time of the employee’s retirement. 69 M.S.P.R. at 332 & n.3. In *Cox*, the Board similarly cited the mandatory nature of the OPM checklist that identified the forms and documents that “*must be submitted*” to OPM. 69 M.S.P.R. at 322 (emphasis in original). There simply was no mandatory certification or checklist requirement in effect at the time of the appellant’s retirement that the employing agency failed to follow.

¶10 That the specific certification requirement of FPM Letter 831-83 does not apply in this appeal does not mean that OPM and the employing agency did not have a duty to apprise the appellant of the opportunity to make a deposit for his post-1956 military service prior to separation, and of the consequences of not doing so. As the Board noted in *Jacob*, “OPM had previously ‘urge[d] all

⁴ We note that the CSRS and FERS Handbook for Personnel and Payroll Offices, which contains OPM’s current guidance on retirement-related matters, devotes an entire chapter (ch. 23) to the subject of service credit for post-1956 military service, but this Handbook does not appear to address the issues presented in this appeal.

agencies . . . to counsel employees’ regarding the deposit requirement.” 69 M.S.P.R. at 344 (quoting 48 Fed. Reg. 3354 (1983)). The Board similarly noted in *Nunez* that “OPM’s announced intent in its regulations promulgated in 1984 was to create an ‘exception to the rule’ that employees are required to pay the military deposit prior to separation as ‘strict enforcement would work a hardship on many blameless persons.’” 69 M.S.P.R. at 333 (quoting 49 Fed. Reg. 20,631 (1984)). The question, then, is whether OPM’s 1990 version of its retirement application form, together with the attached instructions, is reasonably designed to apprise an applicant of his rights and obligations with respect to post-1956 military service.

¶11 Schedule A of OPM’s 1990 version of the retirement application asks the applicant to list the nature and dates of all military service performed, and then asks the following question:

If any of your military service occurred on or after January 1, 1957, have you paid a deposit to your agency for this service? (You must pay this deposit to your agency before separation. You cannot pay OPM after you retire.) See Section B of the instructions for the effect on your annuity if the deposit is not paid.

Subtab 5. There are three checkboxes beside this question: Yes, No, and Not Applicable. Even though he had listed military service that occurred after January 1, 1957, the appellant checked the “Not Applicable” box.

¶12 Section B of the instructions, referred to in Schedule A, contains the following guidance:

Post-1956 Military Service

If you performed military service on or after January 1, 1957, you may pay a deposit of 7% of your military basic pay (plus interest, if applicable) to cover that service. **The military service deposit must be paid to your agency while you are still employed.** If the deposit is not paid, your post-1956 military service will be credited as described below.

If you were first employed in a position subject to civil service retirement before October 1, 1982:⁵

If you do not make the deposit and you are eligible for Social Security benefits at age 62, your annuity will be recomputed (at age 62) to eliminate credit for the post-1956 military service. (If you are age 62 or over when you retire and are eligible for Social Security benefits, no credit for post-1956 military service will be allowed in the computation of your annuity unless you pay the deposit before you separate.)

Subtab 5 (emphasis in original).

¶13 We think these provisions are reasonably designed to apprise an applicant of his opportunity to make a deposit for his post-1956 military service prior to separation, and of the consequences of not doing so. Both the form itself and the attached instructions advise that deposits for post-1956 military service must be paid prior to separation, and the instructions explain that the employee's annuity will be reduced at age 62 to eliminate credit for this service if the deposit is not paid.

¶14 The appellant argues that both the form and the instructions are ambiguous and misleading. He contends that the question on the form—If any of your military service occurred on or after January 1, 1957, have you paid a deposit to your agency for this service?—is misleading because the question applies to all retirees with post-1956 military service, and that “Not applicable” should therefore not be listed as an option. Not all employees have post-1956 military service, however. For those applicants who do not have such service, “Not Applicable” is the accurate response. For the appellant, however, the only accurate answer was “No.”

¶15 The appellant argues that the instructions in Section B are misleading, in that they provide that an employee with post-1956 military service “may” pay a

⁵ The appellant was first employed under CSRS in 1980. *See* Subtab 6.

deposit to cover the service. He points out that “may” generally means “might” or “possibly,” as distinguished from a mandatory requirement that must be performed. But the permissive word “may” is correct. No one is obligated to make a deposit for post-1956 military service. The instructions clearly explain that a deposit must be made if the employee is to avoid having his annuity recomputed at age 62 to eliminate service credit for his post-1956 military service.

¶16 It may be, as the appellant contends, that the certification requirement of FPM Letter 831-83, in which an employee with post-1956 military service was required to specifically affirm that he understands the consequences of not making a pre-separation deposit for that service, would better apprise employees of their rights and obligations. The question before us, however, is whether OPM’s current administrative procedure constitutes “administrative error” within the meaning of 5 C.F.R. § 831.2107(a)(1). We conclude that it does not.⁶

OPM committed administrative error in the processing of the appellant’s application that compels it to allow him to make a post-retirement deposit for his post-1956 military service.

¶17 Our finding that OPM’s current administrative practice is reasonably designed to apprise applicants for retirement of the opportunity to make a deposit for post-1956 military service, and of the consequences of not doing so prior to separation, does not by itself compel a finding that there was no administrative error requiring OPM to allow the appellant to make a post-retirement deposit. The Board has found administrative error justifying a post-retirement deposit where OPM was negligent in processing an application for retirement. In *Mopps*, for example, the Board declined to find that OPM committed administrative error

⁶ We note that, in at least two previous decisions, the Board has indicated that the 1990 version of SF-2801 corrected deficiencies in earlier versions of the form. See *Owens v. Office of Personnel Management*, 76 M.S.P.R. 543, 548 (1997); *Jacob*, 69 M.S.P.R. at 343.

when it processed an obsolete (pre-January 1990) application form. 69 M.S.P.R. at 318. It found, however, that OPM committed administrative error by not offering the annuitant another opportunity to make a deposit after learning that he had not been apprised of his rights. *Id.*

¶18 In finding administrative error, the administrative judge relied in part on the appellant's testimony that he had never received the instructions that should have accompanied the application form. Initial Decision at 4.⁷ Although our review of the hearing tape confirms that the appellant so testified, that testimony is contradicted by the appellant's representative (the appellant's son) on review, who states that he did possess and read the instructions accompanying the application form. Petition for Review File, Tab 3 at 4-5.

¶19 Nevertheless, we find administrative error in OPM's processing of the appellant's application for retirement. As discussed above, the only correct answer to the question, "If any of your military service occurred on or after January 1, 1957, have you paid a deposit to your agency for this service?" was "No." Given that the appellant had listed his post-1956 military service just above his answer to this question, it should have been apparent to any OPM reviewer that the appellant's "Not Applicable" response to the question was inaccurate. Instead of ignoring an obviously inaccurate response on the application form, it was incumbent on OPM under these circumstances to clarify the matter. Had OPM done so, the appellant would have been able to make a deposit for his military service prior to his separation.

¶20 Accordingly, the appellant is entitled, because of OPM's administrative error in processing his retirement application, to have OPM set a time limit under

⁷ The administrative judge noted in this regard that the appellant's son stated that he was the one who actually completed the SF-2801 for his father's signature. *Id.* at n.1.

5 C.F.R. § 831.2107(a)(1) for him to deposit the requisite amount of his base military pay into the Civil Service Retirement and Disability Fund.

ORDER

¶21 We ORDER OPM to set a time limit under 5 C.F.R. § 831.2107(a)(1), before which the appellant may make the military deposit to his employing agency. OPM must complete this action within 20 days of the date of this decision.

¶22 We further ORDER OPM to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which OPM believes it has fully complied. If not notified, the appellant should ask OPM about its efforts to comply.

¶23 Within 30 days of OPM's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with OPM about compliance.

¶24 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD

Robert E. Taylor
Clerk of the Board

Washington, D.C.